174 (4)

No. 10-245

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IN THE

Supreme Court of the United States

In re THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In *Bailey*, this Court expressly ruled that "it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986."[1] *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009) (App. 70a). On remand, the Court of Appeals determined to "adhere to our holding . . . that the bankruptcy court exceeded its [subject matter] jurisdiction in 1986 . . . ." *In re Johns-Manville Corp.*, 600 F.3d 135, 149 (2d Cir. 2010) (App. 30a). As Chubb concedes the Court of Appeals "revisited [and] . . . reaffirm[ed] its prior jurisdictional determination" that this Court overruled in *Bailey*. This violates the mandate of this Court.

Chubb's notice objection was not before this Court in *Bailey* because the issue was not reached by the Court of Appeals. The Court of Appeals' 2008 decision that was reversed by this Court in *Bailey* held that the Bankruptcy Court lacked jurisdiction to issue the 1986 Orders; this Court reversed on the grounds that the confirmation order containing the injunction became final after all direct appeals were exhausted and therefore could not be collaterally attacked. This Court explicitly held that the 1986 injunction is to be enforced in accordance with its plain meaning.

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[1] This Court further stated "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation, and the need for finality forbids a court called upon to enforce a final order to tunnel back . . . for the purpose of reassessing prior jurisdiction de novo." *Bailey*, 129 S. Ct. at 2206 (App. 73a) (internal citations and quotation marks omitted).

On remand, the lower court was obligated to consider Chubb's due process argument consistent with the holding of *Bailey*. Since the Court of Appeals had previously held in 1988 that the 1986 Orders were rendered in full conformity with due process, *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (App. 292a), the only decision consistent with this Court's mandate which the Court of Appeals could have rendered on remand was to reject Chubb's contention. Instead, the Court of Appeals expressly reaffirmed its prior holding—which this Court expressly reversed—that the Bankruptcy Court was without jurisdiction to enter the 1986 Orders. And, in utter disregard of the mandate of this Court and the prior final judgment holding that the notice given prior to the entry of the 1986 Orders was fully consistent with due process, the Court of Appeals proceeded to hold that Chubb lacked constitutionally adequate notice. Mandamus is necessary here because the Court of Appeals' decision violates the mandate of this Court, and improperly overturns a twenty-two year old final judgment addressing the precise issue this Court remanded the case for the Court of Appeals to resolve.

In *Bailey*, this Court found that the "willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with res judicata and the practical necessity served by that rule." *Bailey*, 129 S. Ct. at 2206 (App. 73a). This is no less true with respect to the Chubb notice issue that was remanded to the Court of Appeals. Because the lower court's decision violates this Court's mandate and wreaks havoc on the ability

of bankruptcy courts to function,[2] the writ of mandamus should issue requiring the lower court to comply with the mandate of this Court in *Bailey*.

ARGUMENT

Chubb concedes "[i]t is true that the Second Circuit revisited [and] . . . reaffirm[ed] its prior jurisdictional determination" that the Bankruptcy Court was exceeding its "*in rem* subject matter jurisdiction over the Manville estate when it undertook in 1986 to discharge *non-derivative* present and future claims against non-debtor Travelers." Opp'n at 23–24. Remarkably, however, Chubb argues that this reaffirmation of a jurisdictional holding that this Court reversed was "part and parcel of that court's compliance with this Court's instructions on remand . . . ." *Id.* at 24. This is wrong.

First, this Court remanded this case for the Court of Appeals to consider Chubb's objection that "it was not given constitutionally sufficient

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[2] As discussed further in Petitioner's reply in support of its concurrent petition for writ of certiorari, the Court of Appeals' holding is directly at odds with sixty years of precedent by this Court concerning the adequacy of publication notice for conjectural, future and unknown claimants, which would have seismic and systemic adverse impacts on the bankruptcy system. If for some reason the Court of Appeals felt compelled to undertake a de novo analysis of the publication notice in *Manville*, the Court of Appeals was obligated to apply the constitutional due process standards established by this Court over the last six decades in *Mullane* and its progeny. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317–18 (1950); *see also United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010).

notice of the 1986 Orders, so that due process absolves it from following them, ***whatever their scope***." *Bailey*, 129 S. Ct. at 2207 (App. 75a) (emphasis added). While this Court "assumed that [Chubb is] bound, the Court of Appeals did not consider this question." *Id.* (App. 75a). In short, on remand, the Court of Appeals was simply instructed to consider a claim that had not been reached by the Court of Appeals and was therefore not before this Court. *Id.* (App. 75a). Since a final judgment had previously been entered on direct appeal affirming the constitutional adequacy of the notice procedure in the Bankruptcy Court, and because the extensive publication notice was fully consistent with *Mullane* and its progeny, the only proper disposition of Chubb's due process claim was for the Court of Appeals to affirm that Chubb had received constitutionally adequate notice.

Second, on remand, the Court of Appeals did not limit its inquiry to whether Chubb was absolved from following the 1986 Orders "whatever their scope" but, instead, reinstated a determination that this Court reversed (*i.e.*, that the 1986 Orders exceeded the scope of the Bankruptcy Court's jurisdiction). The Court of Appeals then went on to hold that Chubb could not have been provided constitutionally adequate notice: "because we adhere to our holding . . . that the bankruptcy court exceeded its [subject matter] jurisdiction in 1986, it follows that Chubb is not bound by the terms of the 1986 Orders." *In re Johns-Manville Corp.*, 600 F.3d at 149 (App. 30a). Ignoring the law of the case established by this Court, the lower court then also ignored the express holding of a sister panel of the Court of Appeals which had held in 1988 on direct appeal that "interested par-

ties were provided with notice [which] met the requirements of due process." *MacArthur*, 837 F.2d at 94 (App. 292a). In a truly remarkable bit of *ipse dixit* reasoning, the Court of Appeals held that it was free to disregard the two decade-old final judgment holding that the notice employed in *Manville* fully complied with due process on direct appeal because "the recipient of this Notice would have to predict that the bankruptcy court would exceed its *in rem* jurisdiction in entering the 1986 Orders." *In re Johns-Manville Corp.*, 600 F.3d at 157 (App. 49a). But, this conclusion is 180 degrees at odds with what this Court held in *Bailey*. 129 S. Ct. at 2203 (App. 65a–66a) ("The Bankruptcy Court correctly understood that the Direct Actions fall within the scope of the 1986 Orders ... whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 ...."). Moreover, Chubb clearly falls into the category of parties that this Court has ruled are subject to publication notice. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317–18 (1950); *see also Chemetron Corp. v. Jones*, 72 F.3d 341, 347–48 (3d Cir. 1995).

Chubb erroneously assumes this Court would not have remanded Chubb's due process objections if *MacArthur* decided the issue. But this Court remanded the Chubb notice issue because procedurally Chubb's objections were not before the Court. *See Bailey*, 129 S. Ct. at 2207 (App. 75a). The remand instructions required the Court of Appeals to find, consistent with the principles of finality and repose affirmed in *Bailey*, that there was a final order affirming that the Manville publication notice fully complied with due process

which could not be revisited by a collateral attack to a final confirmation order. *See id.* at 2207 (App. 75a–76a).

From premise, to rationale, to conclusion, the Court of Appeals acted in defiance of what this Court in *Bailey* ruled was off-limits. On remand, the Court of Appeals was required to analyze the issue of whether Chubb was bound by applying the holding of *Bailey* to the 1988 Second Circuit ruling in *MacArthur*. Instead, the Court of Appeals improperly ignored this Court's express holding that the subject matter jurisdiction of the Bankruptcy Court to issue the 1986 Orders could not be revisited.

The Court of Appeals' violation of this Court's mandate is clear. However, the impact of the lower court's violation reaches beyond the disregard of this Court's authority. If the lower court's decision is left unchallenged, it will inflict substantial damage to the principles of finality and repose in bankruptcy, and to sixty years of jurisprudence concerning the constitutional sufficiency of publication notice in the bankruptcy context. Absent a writ of mandamus or review of the lower court's decision pursuant to a writ of certiorari, the lower court's "reaffirmation of its prior jurisdictional determination" will stand as a repudiation of the fundamental principles of finality in bankruptcy articulated by this Court in *Bailey*.

CONCLUSION

For the foregoing reasons, if this Court denies the petition for certiorari in *Travelers Indemnity Co. v. Chubb Indemnity Insurance Co.* concurrently pending, a writ of mandamus should issue requiring the Court of Appeals to comply with the mandate of this Court in *Travelers Indemnity Co. v. Bailey*.

Respectfully submitted,

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